BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities	)	GN Docket No. 00-185
	)	
Internet Over Cable Declaratory Ruling	)	
	)	
Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities	)	CS Docket No. 02-52

COMMENTS OF AOL TIME WARNER INC.

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SUMMARY

The Commission's Declaratory Ruling ("*Declaratory Ruling*") in this proceeding concludes that cable modem service is an interstate information service. Its Notice of Proposed Rulemaking ("*NPRM*") seeks comment on the regulatory ramifications that flow from this conclusion. The decisions ultimately reached by the Commission could have profound effects on the development and deployment of cable modem service. Accordingly, AOL Time Warner Inc. believes that, at this time, the Commission should maintain its policy of deregulation and preemption of information services generally and cable modem service in particular.

A deregulatory policy reflects Congress' clear preference, as expressed in the Telecommunications Act of 1996 ("*1996 Act*"). Section 706 of the 1996 Act directs the Commission to encourage the timely deployment of advanced telecommunications capability to all Americans by "regulatory forbearance." Similarly, Section 230 endorses a deregulatory policy to promote continued competition for Internet and other interactive computer services. Thus far, the Commission has followed these Congressional directives by forbearing from regulating cable modem services, under its policy of "vigilant restraint." This includes permitting cable operators to develop their own business plans to carry multiple Internet service providers ("ISPs"), rather than having the government dictate these requirements.

Given the Commission's finding that cable modem service is an interstate information service, the *NPRM* also seeks comment on the appropriateness of state and local regulation of this service. In particular, the NPRM asks whether local franchising authorities ("LFAs") may require cable operators to obtain additional "information service franchises;" whether LFAs may levy franchise fees on revenue derived from cable modem service; and whether LFAs may impose multiple ISP requirements on cable operators that provide cable modem service. While

cable modem services are delivered over cable systems that typically cross public rights-of-way, they are interstate information services over which the Commission has asserted federal jurisdiction. AOL Time Warner agrees with the Commission that a "patchwork of State and local regulation beyond matters of purely local concern" could impede the development of cable modem service.

Moreover, while state and local officials historically regulated certain cable services, cable modem service is different in terms of its history, its technology and its use. For example, cable television developed as a means to improve the reception of local television broadcast signals in individual communities, and the construction of cable systems entailed disruption to public streets. Thus, it may have been natural for these communities to initiate regulation of cable service through the local franchise process. However, when cable television developed national programming services, the courts and the Commission recognized the growing federal nature of the service, and adopted a dual federal-local regulatory framework. A crucial part of this approach, as expressed in the Cable Communications Policy Act of 1984 ("*1984 Cable Act*") is the preemption of state and local laws that are inconsistent with the federal policy of encouraging growth of this industry free of unnecessary and burdensome restrictions. Given the interstate nature of cable modem service and the global nature of the content carried and the facilities to which such content is delivered, as well as the *1996 Act*'s express directives to encourage the deployment of such services through regulatory forbearance, it is clear that Congress intended for the Commission first to look toward private business arrangements for the development of cable modem service, rather than state and local regulation.

With these Congressional directives in mind, AOL Time Warner agrees with the Commission that LFAs may not "impose an additional franchise on a cable operator that provides cable modem service." Such a requirement would lead to the crazy-quilt approach that Congress recognized would stifle the roll-out of broadband services. Moreover, while cable franchises are based on cable systems' use of public rights-of-way, existing franchises already address this impact. Cable modem service is provided over the same plant as cable television services, thus it does not entail additional burdens to public rights-of-way. For this reason, there is also no justification to impose additional franchise fees on revenues from cable modem service. As the Commission recognized thirty years ago when capping franchise fees on cable service, such fees, if not directly related to additional impact from the use of public rights-of-way, would merely be a revenue enhancement tool for cities and a regressive tax on consumers, who would end up paying higher rates to cover such fees.

Likewise, it would be premature to impose a multiple ISP obligation on cable operators. As the first cable operator to develop and implement a multiple ISP policy, AOL Time Warner knows first-hand the consumer benefits that flow from this model. Time Warner Cable provides a choice of at least three national ISPs to consumers in 35 of its 39 divisions, with the remainder to have this choice in the coming weeks. Time Warner Cable has also entered into numerous additional agreements with national and regional ISPs. As a result of AOL Time Warner's groundbreaking efforts, other cable operators and ISPs have just begun to follow suit, which we are hopeful will result in an expanding, dynamic industry sector.

In addition to these clear policy reasons not to adopt the local forms of regulation addressed in the *NPRM* at this time, each of these forms of regulation would be preempted by federal law. Already, in the wake of the Commission's *Declaratory Ruling*, some LFAs have taken the position that cable operators must obtain an additional franchise before they may provide cable modem service. However, Section 621(a)(2) of the Communications Act (the

"*Act*") provides that "[a]ny franchise shall be construed to authorize the construction of a cable system over public rights-of-way." Thus, federal law does not give LFAs the authority to regulate the content that is delivered over cable systems. Since cable modem service is delivered over the cable system, whose construction has already been authorized by the cable franchise, no additional franchise is necessary to provide these non-local services. Furthermore, Section 624 preempts such attempts to regulate the services provided by the cable operator, especially where, as here, cable modem service has been found to be an interstate service. In any event, the Commission has expressly preempted state regulation of information services. Additionally, a state law ban on providing cable modem service without a separate franchise would violate Dormant Commerce Clause principles, as well as the First Amendment.

AOL Time Warner also agrees with the Commission that, in the wake of its finding that cable modem service is an information service, "revenue from cable modem service would not be included in the calculation of gross revenues from which the franchise fee ceiling is determined." In the *1996 Act*, Congress added language to Section 622(b) of the *Act* (which governs franchise fees) to clarify that any revenue from telecommunications or other non-cable services would be free from franchise fees. Therefore, LFAs may not impose franchise fees with respect to revenue derived from cable modem service. In addition to Title VI, the Internet Tax Freedom Act, which places a moratorium on Internet access taxes, also prohibits such fees.

The Commission should also make clear that cable operators cannot be required to repay subscribers franchise fees collected prior to the *Declaratory Ruling*. The Commission recognizes that, prior to this ruling, such fees were sometimes collected because both cable operators and LFAs believed in good faith that cable modem service was a "cable service." At minimum, the Commission should determine that its *Declaratory Ruling* has no retroactive effect. This would be consistent with past Commission practice and judicial interpretations of past Commission decisions.

Additionally, a multiple ISP requirement would run afoul of numerous sections in Title VI, including Sections 624(a), 624(b), and 621(b)(3)(D). These Sections are designed to prohibit LFAs from regulating the services provided by a cable operator; from establishing requirements for information services, and from requiring that cable operators establish common carrier platforms to provide telecommunications services. Such a requirement would also run afoul of the First and Fifth Amendments to the U.S. Constitution.

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COMMENTS OF AOL TIME WARNER INC.

AOL Time Warner Inc., by its attorneys, submits these comments in response to the Commission's Notice of Proposed Rulemaking[1] in this proceeding regarding the appropriate regulatory treatment for broadband access to the Internet over cable facilities, commonly referred to as "cable modem service." AOL Time Warner's businesses include interactive services, cable systems, publishing, music, networks and filmed entertainment. In particular, Time Warner Cable is an industry leader in the provision of cable modem service, and the first cable multiple system operator ("MSO") voluntarily to adopt a policy designed to offer consumers a choice among multiple Internet service providers ("ISPs") in the provision of cable modem service.[2]

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[1] Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) ("*Declaratory Ruling*" or "*NPRM*").

[2] *See* Memorandum of Understanding Between Time Warner Inc. and America Online, Inc. Regarding Open Access Business Practices (Feb. 29, 2000).

I. REGULATION OF CABLE MODEM SERVICE SHOULD BE KEPT TO A MINIMUM.

A. Federal Regulation.

This proceeding provides a timely opportunity for the Commission to reinforce its longstanding federal deregulatory stance towards information services generally and cable modem service in particular. In the *NPRM*, the Commission indicates its desire to create a "rational framework" for the regulation of cable modem services that is pro-deployment and pro-innovation.[3] In both this and in a related proceeding, the Commission has correctly indicated that the most rational way to "encourage the ubiquitous availability of broadband to all Americans"[4] is to craft public policies around the principle that "'broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market.'"[5] In this atmosphere and in response to competition, cable operators have and are continuing to offer their customers a wide variety of digital, broadband services, and in Time Warner Cable service areas, a choice among multiple ISPs for the provision of cable modem service. This success demonstrates that competitive forces, not government regulation, should be the engine that shapes the deployment of cable modem services.

A policy of regulatory restraint with respect to cable modem service is entirely consistent with Congressional pronouncements on deployment of broadband services. Congress has indicated in the clearest of terms that encouraging the penetration of broadband is a national priority, and thus the Commission must consider ways to reduce, not expand the regulatory

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[3] *See NPRM* ¶ 6.

[4] *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Universal Service Obligations of Broadband Providers*, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 ¶ 3 (2002) ("*Wireline Broadband NPRM*").

[5] *NPRM* ¶ 5 (citing *Wireline Broadband NPRM* at ¶ 5).

burdens that may hamper its growth. Section 706 of the Telecommunications Act of 1996 ("*1996 Act*") charges the Commission with "encourag[ing] the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by "regulatory forbearance, measures that promote competition . . . , or other regulating methods that remove barriers to infrastructure investment."[6] The *1996 Act* also added Section 230(a) to the Communications Act of 1934,[7] which expressly endorses the "rapidly growing array of Internet and other interactive computer services."[8] Similarly, Section 230(b)(2) of the Act establishes federal policy "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[9] Thus, the Commission is certainly on the right path in stating that it seeks to remove "regulatory uncertainty that in itself may discourage investment and innovation" and asking "how best to limit unnecessary and unduly burdensome regulatory costs."[10]

To date, the Commission has correctly taken a position that, to the extent it has regulatory authority with respect to cable modem service, it would be premature for it to exercise that authority. In 1999, the Cable Services Bureau conducted the first Commission review of the development of cable modem service and other broadband Internet services and concluded that a policy of "vigilant restraint" was the preferred approach to foster the rapid competitive

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[6] Telecommunications Act of 1996, Pub. L. No. 104-104, Title VII, § 706 (1996), 110 Stat. 56, 153, reproduced in the notes under 47 U.S.C. § 157 ("Section 706").

[7] 47 U.S.C. § 151 *et. seq.* (the "Act").

[8] 47 U.S.C. § 230(a).

[9] 47 U.S.C. § 230(b)(2).

[10] *NPRM* ¶ 5.

deployment of cable modem services.[11] The Bureau rejected calls to impose a multiple ISP requirement:

> The notion of applying prophylactic "open access" measures – whether they be in the form of Title II, Title VI, or more simple unbundling regulations – before fuller development of the broadband industry would be unsound public policy that could have the unintended effect of impeding the rapid development of this industry. The market is the only force, at this stage, that is sufficiently dynamic and informed to create a competitive broadband marketplace.[12]

The Bureau noted that a multiple ISP requirement dictated by the government rather than the marketplace would almost certainly have significant adverse effects on deployment of cable modem services:

> While we are not persuaded necessarily that cable operators would halt their nationwide broadband deployment in the face of a mandated access requirement, there is a significant and credible risk that rapid deployment of these services to all Americans would be greatly compromised.[13]

In light of such concerns, the Commission has not veered from its policy of "vigilant restraint,"[14] a policy that continues to this day. In the absence of regulation, while investment in and deployment of broadband facilities and services have flourished, only Time Warner Cable has taken meaningful steps to offer consumers a choice of multiple ISPs company-wide.

Now that the Commission has determined cable modem service to be an "information service," this policy of "vigilant restraint" coalesces with the Commission's thirty-year-old

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[11] *See* "Broadband Today," A Staff Report to Chairman William E. Kennard, by the Cable Services Bureau, Federal Communications Commission, Oct. 1999, at 15.

[12] *Id.* at 44.

[13] *Id.* at 45.

[14] *See, e.g., Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc. to AT&T Corp.*, 15 FCC Rcd 9816 (2000) (Statement of Chairman William E. Kennard)(asserting his continued support for "vigilant restraint" relating to the imposition of an "open access" requirement with respect to cable modem service).

policy of non-regulation of information services.[15] This policy of restraint has undoubtedly led to the explosive growth of a myriad of information processing and delivery services, most significantly the phenomenal growth of the Internet.

In the *1996 Act*, Congress indicated its strong support for the Commission's long-standing policies regarding the unregulated nature of information services. *First*, it codified the basic concepts underlying the definition of "enhanced services" in the new defined term "information services."[16] Significantly, despite this new definition, nothing in the *1996 Act* indicated any Congressional intent whatsoever to overrule the Commission's deregulatory approach to enhanced/information services or to impose a new regulatory regime on such services. *Second*, as mentioned above, it set forth in Section 230 an express federal policy that Internet services should be left unregulated in order that deployment and innovation not be hampered.

The Commission has correctly interpreted the *1996 Act* to reinforce the unregulated treatment of such services. For example, it properly ruled that the new "information services" definition in the *1996 Act* affirms the underlying policies of the *Computer Inquiries* by finding that the services formerly classified as enhanced are now encompassed within the statute's

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[15] *See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 FCC 2d 384 ¶¶ 113-114 (1980); *Computer & Communications Industry Ass'n v. FCC*, 693 F.2d 198, 207 (D.C. Cir. 1982), *cert. denied,* 461 U.S. 938 (1983); *Amendment of Section 64.702 of the Commission's Rules and Regulations*, Report and Order, 104 FCC 2d 958, ¶ 348 (1986) ("[T]o permit application of inconsistent regulatory requirements to the provision of interstate and intrastate enhanced service offerings would be impracticable and would effectively negate federal policy.").

[16] 47 U.S.C. § 153(20). ("Information service" is defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.").

definition of "information services."[17] The Commission has also reaffirmed that nothing in the *1996 Act* changes the longstanding federal policy that enhanced/information services should be left unregulated to the greatest extent possible.[18] Finally, it reiterated that service provided by ISPs is "interstate" in nature, reinforcing that federal and not state policies should guide the development of such services, including cable modem service.[19] Indeed, it is well settled that the Commission has primary and exclusive jurisdiction over all interstate communications.[20] All of these actions reinforce the long-standing wisdom of keeping the Internet substantially unregulated.

In any event, additional regulation of cable modem service is not presently warranted. The Commission's own data and analysis fail to demonstrate that a marketplace failure has occurred that would warrant the imposition of new regulations imposing a multiple ISP requirement on cable operators at this time. In the most recent Section 706 report, the Commission analyzed the current state of competition in the broadband Internet service arena.[21]

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[17] *See Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, ¶ 102 (1996).

[18] *See, e.g., Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers*, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, 11 FCC Rcd 21354, ¶ 282 (1996).

[19] *See NPRM* ¶ 59 (citing *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151, ¶ 52 (2001)).

[20] *Federal-State Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, ¶ 836 (1997) (Section 2(a) of the Act "grants the Commission sole jurisdiction over interstate and foreign communications"); *Petitions of MCI Telecommunications & GTE Sprint Communications Corp.*, Memorandum Opinion and Order, 1 FCC Rcd 270, ¶ 23 (1986) (noting that the Commission has "exclusive jurisdiction over interstate communications").

[21] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such*

According to the Commission's findings, broadband services are characterized by (1) deployment in a reasonable and timely manner, (2) ever-increasing availability of diverse and innovative services, (3) increasing subscribership, and (4) resilient investment despite periods of economic downturn.[22] The current state of high-speed Internet access service is obviously one of robust competition, diverse technologies and innovation. These findings, consistent with the findings in the previous two Section 706 reports, are a testament to the strength and resiliency of facilities-based competition in the provision of high-speed Internet access service, and indicate that a continuation of the policy of "vigilant restraint" is the appropriate approach for now.

B. State and Local Regulation.

The *NPRM* notes that while the Commission has classified cable modem service as an interstate information service subject to federal jurisdiction, it is provided over cable system facilities that occupy local rights-of-way.[23] Expressing concern that a "patchwork of State and local regulations beyond matters of purely local concern" could impede the development of cable modem service,[24] the *NPRM* requests comment on what aspects of the service, if any, should be subject to regulation by state and/or local regulatory authorities.[25]

The Commission is to be commended both for acknowledging its concern about the threat that state and local cable modem service regulation poses to the national policy goal of

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(footnote continued)
Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Third Report, 17 FCC Rcd 2844 (2002) ("*Third Section 706 Report*").

[22] *Id.* at ¶¶ 1, 61, 89-90, 99.

[23] *NPRM* ¶ 96.

[24] *Id.* ¶ 97.

[25] *Id.* ¶¶ 98 - 108.

rapid deployment of high-speed broadband facilities and for laying, through its classification of cable modem service as an interstate information service, a solid foundation for keeping such regulation within proper bounds. In particular, AOL Time Warner urges the Commission to expressly declare, as a general policy matter, that simply because state and local officials historically have exercised regulatory jurisdiction with regard to certain aspects of the cable television business, this does not lead to the conclusion that it would be appropriate or desirable for state and local governments to exercise a similar level of regulatory authority over cable modem service. Rather, as a review of the development of nonfederal jurisdiction over cable systems indicates, a bright line distinction can and should be drawn between traditional cable services and cable modem service when it comes to defining the scope of state and local regulatory authority.

The role traditionally played by local governments in regulating cable television systems is a by-product of cable television's origins as a fundamentally local service that was designed principally to improve the reception of over-the-air broadcast signals. Thus, local cable regulation developed in a highly insular fashion through the award of franchises on a community-by-community basis. Indeed, what we now call "cable television" initially was known as "community antenna television service" or "CATV."

Local officials justified their regulation of early CATV systems on the grounds that the stringing of wires from the system's reception equipment to individual homes required the construction of facilities that use public rights-of-way. However, as the number of systems grew, the FCC recognized that the operation of these facilities was not exclusively a matter of local concern. In particular, the FCC invoked (and the United States Supreme Court upheld) its jurisdiction to adopt federal cable regulations.[26]

By the early 1970's, local regulation of CATV facilities had expanded well beyond matters directly impacting on the use of public rights-of-way. Concerned about the adverse effects of this regulatory evolution, the FCC formally delineated the federal and nonfederal areas of regulatory authority in 1972, announcing a policy of "deliberately structured dualism."[27] This policy recognized that the development of cable television was an issue of national concern requiring federal oversight and, with respect to certain matters, federal preemption.

Generally speaking, the dividing line that the Commission established between the nonfederal and federal areas of regulatory authority "rest[ed] on the distinction between reasonable regulations regarding use of the streets and rights-of-way and the regulation of the operational aspects of cable communications."[28] Thus, for example, regulation of technical standards, signal carriage, and non-basic cable rates all fell within the FCC's exclusive jurisdiction. Moreover, even matters that were closely related to the use of public rights-of-way, such as the establishment of construction build-out schedules, franchise fee payments, and franchise term duration, were made subject to federal guidelines and standards that restricted the discretion of nonfederal officials, thereby promoting regulatory uniformity and predictability.

The *1984 Cable Act*[29] essentially codified the Commission's determination that the regulatory stability and certainty needed to encourage the growth and development of cable

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[26] *See U.S. v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

[27] *See Cable Television Report and Order*, 36 FCC 2d 143, ¶¶ 177-188 (1972).

[28] *Duplicative and Excessive Over-Regulation of Cable Television*, 54 FCC 2d 855, ¶ 21 (1975).

[29] Cable Communications Policy Act of 1984 ("*1984 Cable Act*" or "*1984 Act*"), Pub. L. 98-549, 98 Stat. 2780 (amending the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*).

television was dependent on the articulation of a national policy framework that delineated the proper scope of federal and nonfederal regulatory jurisdiction. To this end, the legislative history accompanying the *1984 Cable Act* expresses, as one of the primary goals of the legislation, the objective of encouraging the "growth and development of cable systems,"[30] free of unnecessary and burdensome restrictions imposed by state and local authorities, while the legislation itself provides that "any provision of law of any State, political subdivision, agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this Act shall be deemed to be preempted and superseded."[31]

The success of the clear articulation of a preemptive policy with respect to most state and local regulation of traditional cable service was immediate and obvious. Over the decade following the enactment of the *1984 Cable Act*, cable television systems became ubiquitous and achieved the financial stability necessary to drive development of an unparalleled diversity of video programming choices for consumers. While the *1984 Act* has been amended from time to time, the fundamental policy objective of minimizing and rationalizing the role of state and local governments has not been substantially altered.

The historical evolution of the roles played by federal and nonfederal authorities in regulating traditional cable systems is significant not only because it points up the paramount importance of avoiding a patchwork of local regulation that would impede the development of cable modem service, but also because it highlights the fact that to whatever extent some degree of local regulation may remain appropriate with respect to certain aspects of traditional cable

[30] H.R. REP. NO. 98-934, at 40 (1984).

[31] 47 U.S.C. § 556(c). In including this provision in the *1984 Cable Act*, it was Congress' intent to make it clear that the exercise of nonfederal regulatory authority with respect to cable television must not conflict with the federal policy of minimally regulating cable service. *See* Cable Telecommunications Act of 1983, S. REP. NO. 98-67, at 30 (1983).

service, a distinction must be drawn as to the exercise of state and local authority over any operational aspect of cable modem service.

The principal reason that drawing such a distinction is appropriate is that the regulation of cable television by state and/or local officials today is largely a legacy of cable's origins as a locally-oriented service. For example, state and local officials continue to have the authority to select one or more franchisees based on *local* needs and interests, to renew cable franchises in accordance with federal standards, to enforce *local* customer service (albeit subject to federal guidelines) and to regulate basic (*i.e., local* broadcast retransmission service) service rates.[32]

In contrast, unlike traditional, locally-oriented cable service, cable modem service is an integral component in a global network of networks. Neither the facilities over which it is delivered nor the content to which it provides access are limited to a particular community. While traditional cable television regulation originated during an era in which most cable systems were "mom and pop" operations offering simple services to limited geographic areas with no need for interconnection or technically compatible facilities, the cable industry of the 21st century is characterized by technologically sophisticated MSOs that utilize multi-state marketing strategies in providing cable modem service (as well as, in many cases, telephony) to large, interconnected clusters of communities that cross numerous political subdivisions.[33]

It thus is a certainty that a patchwork of varying and inconsistent regulations adopted at the state or local level with respect to operational aspects of cable modem service will impede

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[32] *See, e.g.,* 47 U.S.C. §§ 531, 546, 552, 543.

[33] As the Commission has repeatedly noted in its annual video competition reports, "[b]y clustering their systems, cable operators may be able to achieve efficiencies that facilitate the provision of cable and other services, such as telephony." *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighth Annual Report, 17 FCC Rcd 1244, ¶ 14 (2002).

the development and deployment of that service, just as, say, inconsistent regulation of trucks can severely impede interstate trucking.[34] And it is clear that, particularly in light of the Congressional directive under Section 230(b)(2) of the Act "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation,"[35] the Commission should follow the example of the *1984 Cable Act* by insulating cable modem service from unnecessary state and local regulation. A uniform, national approach to cable modem service will best ensure that the Commission will accomplish its policy objectives with regard to the development and deployment of high-speed Internet services. As observed by then-Commissioner Powell, if "a contagion of different approaches proliferate throughout the country we will end up with an incoherent, disjointed policy mélange that seems sure to impede the development of advance services, in any form, for our citizens. Such concerns underlie the Constitutional commitment to interstate commerce and the federal supremacy clause."[36]

II. THERE IS NO VALID POLICY BASIS FOR PERMITTING LFAs TO ENGAGE IN ANY OF THE SPECIFIC FORMS OF REGULATION ADDRESSED IN THE *NPRM*.

The *NPRM* invites comment on three major forms of local regulation: it asks whether LFAs may demand that cable operators obtain additional "information service franchises"; whether LFAs may levy franchise fees on revenue derived from cable modem service; and

[34] *Cf. Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529 (1959) (holding that state statute violated dormant Commerce Clause where it would have required a kind of mud flap that was "out of line with the requirements of almost all the other States").

[35] 47 U.S.C. § 230(b)(2).

[36] Remarks by Commissioner Michael K. Powell, Before the Federal Communications Bar Association, Chicago Chapter (June 15, 1999).

whether LFAs may impose multiple ISP requirements. In each of these specific areas, additional LFA regulation could stifle the further penetration of broadband service. The Commission should not permit it.

A. There Is No Valid Policy Basis for Permitting LFAs To Require Cable Operators To Obtain Additional Information Service Franchises.

The *NPRM* invites comment on the Commission's tentative conclusion that LFAs may not "impose an additional franchise on a cable operator that provides cable modem service."[37] That conclusion reflects sound policy. Allowing LFAs to require cable operators to obtain new franchises as a condition for being allowed to provide cable modem service would open the floodgates to all kinds of onerous and disparate regulation. As the current experience with video shows, the franchising process is often used by LFAs to engage in broad-ranging regulation, limited only by the *1984 Cable Act*. Thus, allowing LFAs to demand franchises for information services would likely result in broad-ranging regulation that might differ in each locality — precisely the kind of crazy-quilt approach that might stifle the continuing roll-out of broadband service.[38]

Besides, there is no policy rationale for allowing LFAs to demand that cable operators enter into information service franchises. Franchising of cable television systems has traditionally had its policy rationale in cable systems' use of public rights-of-way.[39] Plainly,

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[37] *NPRM* ¶ 102.

[38] *See NPRM* ¶ 97 ("We would be concerned if a patchwork of State and local regulations beyond matters of purely local concern resulted in inconsistent requirements affecting cable modem service, the technical design of the cable modem service facilities, or business arrangements that discouraged cable modem service deployment across political boundaries.").

[39] *See, e.g., Entertainment Connections, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 14277, ¶ 52 (1998) ("[T]he cable franchise requirement of Section 621(b) is inextricably linked to the use of public rights-of-way.").

LFAs have legitimate interests in guaranteeing public safety and limiting annoyance to the citizenry when cable operators, telephone companies, and electric utilities dig up the streets or string wires on poles. But existing cable television franchise agreements already safeguard those interests. Cable television franchise agreements typically require that cable operators as much as possible place cable plant underground, that they notify residents and obtain permits before breaking the streets, and that they generally conduct their business in such a way as to minimize disruption.[40] Thus, there is no sensible reason for an additional franchise.

That is particularly true because the addition of cable modem service to a cable operator's offerings does not in any way implicate LFAs' interests in management of public rights-of-way. Because cable modem service is provided over precisely the same plant as cable television service, there is no additional burden on public rights-of-way. It is true that, to provide cable modem service, cable operators must install additional equipment — including Cable Modem Termination Systems ("CMTSs"), servers, and routers.[41] But all that equipment is housed on privately owned real estate at the cable operator's headend and the ISP's data center.[42] Thus, the

[40]For example, Time Warner Cable's franchise agreement with New York City provides that, "[i]n connection with the construction, operation, maintenance, repair, upgrade, or removal of the System, [Time Warner Cable] shall not obstruct the Streets, subways, railways, passenger travel, river navigation, or other traffic to, from, or within the District without the prior consent of appropriate authorities." Cable Television Franchise Agreement for the Borough of Manhattan, § 6.7. The agreement also requires that, where existing public utility plant is underground, Time Warner Cable too "shall install its cable underground." *Id.*, App. B. Similarly, Time Warner Cable's franchise agreement with Austin, Texas, provides that Time Warner Cable "shall place certain facilities underground according to applicable City Requirements," that all "excavations and other construction in the Public Rights-of-Way shall be performed in accordance with all applicable City Requirements," and that all construction "shall be undertaken so as to minimize interference with the use of public and private property." Ordinance No. 960613-A, §§ 8.1-8.3.

[41]*See Declaratory Ruling* ¶ 13.

[42]*See id.*

only added "burden" on public rights-of-way consists of the additional electromagnetic waves that are transmitted over already existing cable wires. That "burden" does not implicate any legitimate interests in management of public rights-of-way.[43]

B. There Is No Valid Policy Basis for Permitting LFAs To Levy Franchise Fees with Respect to Revenue Derived from Cable Modem Service.

Franchise fees have an effect similar to the sin taxes that governments impose on alcohol and cigarettes. Sin taxes are intended to decrease consumption of products that have negative externalities — say, drunk-driving accidents and costs related to treatment of cancer patients. But the consumption of broadband service has positive externalities. Quite apart from positive *network* externalities,[44] it is widely believed that the penetration of broadband will spur

[43] *Cf. Bell Atlantic-Maryland, Inc. v. Price George's County*, 49 F. Supp. 2d 805, 820 (D. Md. 1999) ("consistent with [47 U.S.C. § 253(c)], the County may not require telecommunications companies which provide telecommunications services through lines and facilities owned by others to obtain a franchise") *vacated and remanded on other grounds*, 212 F.3d 863 (4th Cir. 2002), *on remand*, 155 F. Supp. 2d 465, 477 (D. Md. 2001) ("[T]he County already has a series of regulations in place by which it maintains the safety of its rights of way. That system is further evidence that the new ordinance is properly construed as an attempt to regulate the telecommunications companies."); *AT&T Communications of Southwest, Inc. v. City of Austin*, 40 F. Supp. 2d 852, 855-56 (W.D. Tex. 1998) (holding that 47 U.S.C. § 253 pre-empted ordinance requiring CLEC providing service over unbundled network elements to obtain franchise separate from ILEC's because, although CLEC "transmit[ted] signals consisting of electrons and lightwaves" over ILEC's wires, it did not "erect telephone poles or dig holes in the City's streets"), *vacated as moot*, 235 F.3d 241 (5th Cir. 2000); *AT&T Communications of Southwest, Inc. v. City of Austin*, 975 F. Supp. 928, 941 (W.D. Tex. 1997) ("The City's only legitimate interest under federal and Texas law is to regulate its public rights-of-way, an interest that is in no way implicated by AT&T's activities in Austin.").

[44] *See Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, ¶ 8 (1997) ("*Universal Service Order*") ("At the simplest level, increasing the number of people connected . . . makes the network more valuable to all of its users by increasing its usefulness to them.").

beneficial economic activity in a more general sense.[45] Thus, there is no justification for any special exactions on broadband service. If anything, consumption of broadband service should be encouraged by lightening its burden.[46]

That cable modem service is provided over cable television systems does not point to a different result. LFAs were permitted to impose special fees on cable television service for historically sensible reasons. First the Commission and later Congress permitted (but capped) franchise fees as a nod to pre-existing reality: LFAs had for some time been imposing such fees before federal regulators arrived on the scene.[47] Even so, the Commission acknowledged that, insofar as franchise fees exceeded the cost of the use of public rights-of-way, "[t]he ultimate effect" was "to levy an indirect and regressive tax on cable subscribers" and possibly to "burden cable television to the extent that it will be unable to carry out its part in our national

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[45]*See, e.g., Bush Points to FCC for Broadband Policy*, COMMUNICATIONS DAILY, June 14, 2002, at 1-2 ("President Bush . . . said 'this country must be aggressive about the expansion of broadband'" and the Commission must "'understand the true economic vitality that will occur when broadband is more fully accessible'"); John Gallant, *AT&T Broadband Joins Debate*, NETWORK WORLD, May 27, 2002 ("Broadband access is one of the most important issues facing the U.S. today. Affordable, widely available broadband would go far in re-energizing the growth of the economy and spur the development of many new applications — from conferencing to entertainment."); *Over 29 Million In United States Access Internet With High-Speed Connection As Kanakaris Wireless Expands Online Movie Delivery*, BUSINESS WIRE, Mar. 20, 2002 ("[T]he widespread rollout of broadband Internet is considered vital to the U.S. economic recovery.").

[46]*Cf. Amendment of Part 76 of the Commission's Rules and Regulations Relative to the Advisability of Federal Preemption of Cable Television Technical Standards or the Imposition of a Moratorium on Non-Federal Standards*, Clarification of the Cable Television Rules and Notice of Proposed Rulemaking and Inquiry, 46 F.C.C.2d 175, ¶ 96 (1974) (exempting premium and pay-per-view services from pre-1*984 Cable Act* franchise fees in order to promote such services' growth).

[47]*See Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems; and Inquiry Into the Development of Communications Technology and Services to Formulate Regulatory Policy and Rulemaking and/or Legislative Proposals,* Cable Television Report and Order, 36 F.C.C.2d 143, ¶ 185 (1972).

communications policy."[48] It makes no sense to allow impositions with such effect to spread into an entirely new area, particularly when this might stunt the growth of an economically vital resource.

C. There Is Currently No Valid Policy Basis For Imposition Of A Multiple ISP Obligation By Any Level Of Government.

1. Abandoning the Commission's marketplace approach to achieve multiple ISP choice on cable systems would be premature.

As explained above, thus far, the Commission's policy of "vigilant restraint" with respect to the development of cable modem service has yielded positive benefits. For example, in its *Third Section 706 Report*, the Commission again concluded generally that "advanced telecommunications is being deployed to all Americans in a reasonable and timely manner."[49] More specifically, the Commission estimated that, as of December 31, 2001, cable modem service was available to 77.5 million households, and that 94% of the nation's population will soon have access to a broadband wireline service (cable modem or DSL).[50]

In particular, there are signs that an unfettered marketplace approach will lead to the accomplishment of the Commission's salutary goal of providing consumers with a choice among multiple ISPs for the receipt of high-speed Internet service via cable systems. Following Time Warner Cable's groundbreaking lead, we are hopeful that other cable MSOs will respond to evidence that multiple ISP choice makes cable modem service more attractive to consumers. For example, with multiple ISPs offering cable modem service to consumers in connection with the same cable system, each ISP has an incentive to differentiate itself, *e.g.*, by offering different

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[48] *Id.*

[49] *Third Section 706 Report* at ¶ 1.

[50] *Id.* at ¶¶ 61, 65.

features and price points. Moreover, with multiple ISPs, each will devote efforts and resources to the marketing and branding of their respective offerings, thereby raising consumer awareness of the advantages of cable modem service generally.[51]

In short, as cable operators fully appreciate from their video programming business, consumers like choice. The developing array of options for the receipt of high-speed Internet service, both in terms of intermodal providers (cable modem, DSL, satellite, wireless, etc.), as well as the growing availability multiple ISPs competing on an intramodal basis, gives consumers higher overall satisfaction levels.

Similarly, multiple ISP choice has been embraced by ISPs. Time Warner Cable is gratified by the number of both national and regional ISPs that have been willing to engage in marketplace negotiations designed to arrive at mutually beneficial arrangements for the provision of high-speed Internet service in partnership with a wide variety of cable systems operated by Time Warner Cable. Indeed, it has become apparent that ISPs are anxious to diversify their offerings to include both broadband and narrowband options over a variety of intermodal platforms. Moreover, ISPs have little history of or familiarity with local regulation. Their practices and business plans are typically uniform on a national or regional basis. It would be difficult, if not impossible, for ISPs to build business plans against the backdrop of rules that differ in every locality. If competitive conditions ever warrant imposition of a multiple ISP requirement, it is a matter that demands national uniformity through FCC action.

[51] Many have suggested that any perceived "delay" in broadband deployment is more an issue of consumer demand than of supply. For example, Chairman Powell has cited statistics estimating broadband availability of almost 85%, compared to household subscription of 12%, as evidence of a "demand gap." Remarks of Chairman Michael K. Powell, National Summit on Broadband Deployment (Oct. 25, 2001).

The Commission's marketplace approach to cable modem service also has the advantage of allowing for arms-length negotiations to achieve particularized commercial arrangements that are tailored to the unique needs and goals of each individual ISP and cable operator. In particular, following the announcement of the merger of America Online, Inc. ("AOL") and Time Warner Inc., and before any regulatory conditions were agreed to in connection with it, AOL and Time Warner Cable developed a new business model for the offering of multiple ISPs on cable systems. That model, described below, is designed to meet the business needs of ISPs as well as cable operators, while also serving the needs of consumers. Significantly, the business model developed by Time Warner Cable does not involve separate transport and content components provided by the cable operator and ISP, respectively, just as Time Warner Cable's affiliation agreements with video programmers do not involve separate transport and content components.[52] Rather, a multiple ISP approach to cable modem service involves a seamless product developed and offered jointly by the cable operator and ISP.[53]

The proper analogy here is not that of the ISP and the ILEC in the DSL context. Rather, the more apt analogy is that of the pay cable service and the cable operator. In the earlier days of cable's development, when the average system channel capacity was between 12-36 channels,

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[52]The Commission correctly concludes that "neither AOL Time Warner nor any ISP is offering subscribers a separate telecommunications service," *NPRM* ¶ 53, but finds that the record does not contain sufficient facts to determine whether Time Warner Cable might be providing "telecommunications" to ISPs, albeit on a private carrier basis. *NPRM* ¶54. Time Warner Cable does not offer "transport," even on a private carrier basis, to any ISP in connection with the provision of cable modem service from the cable headend to the consumer, just as it does not provide "transport" to the video programming services carried on its systems.

[53] The Commission has recognized this fact. *See NPRM* ¶¶38-39 ("As currently provisioned, cable modem service is a single, integrated service that enables the subscriber to utilize Internet access service through a cable provider's facilities and to realize the benefits of a comprehensive service offering. Cable modem service is not itself and does not include an offering of telecommunications service to subscribers.").

cable operators typically offered only one pay cable service, often a service that shared common ownership with the cable operator. Conventional wisdom was that additional pay cable service would simply "cannibalize" subscribers away from the operator's existing premium offering. However, as channel capacity expanded, operators began to offer multiple pay services. These services sought to differentiate themselves, *e.g.*, through exclusive windows for feature films and creation of original programming. Pay services and cable operators both stepped up their marketing campaigns, raising consumer awareness of particular brands and pay cable service generally. The result was a classic case of "expanding the pie" -- rather than simply taking customers from the existing pay service, the introduction of multiple premium service offerings caused the entire category to grow. Indeed, Time Warner Cable's overall pay cable subscribership has continued to climb with the availability of multiple premium service offerings. And because the pay service/cable operator financial relationship is based on a revenue sharing model, each party has strong incentives to strive for continued growth and customer satisfaction.

Under Time Warner Cable's multiple ISP business model, which is now being implemented on its cable systems, the ISP and the cable operator together offer an integrated Internet service to consumers and both retain a direct interest in providing the service to the customer. Just as the cable industry recognized over time that pay programmers could differentiate themselves from one another so that consumers would want a choice of pay services on their cable systems, so too has Time Warner Cable recognized that ISPs have differentiated their offerings such that there is consumer demand for multiple ISPs on their cable systems. In fact, Time Warner Cable's experience with multiple ISP offerings thus far bears this out. As noted by Time Warner Cable Ventures President and CEO Christopher Bogart, offering multiple

"ISPs has boosted Time Warner Cable's broadband Internet subscriber additions 20 to 25 percent in initial launch markets without cannibalizing subscriptions to its own Road Runner Internet service."[54]

The most important characteristic of the Time Warner Cable multiple ISP business model is that both Time Warner Cable and the ISP retain a direct interest in each customer's account and share in the economics of each customer pursuant to individually negotiated affiliation agreements between Time Warner Cable and the ISP, just as Time Warner Cable does with its pay programmers. This direct financial interest ensures that both parties are strongly motivated to ensure that customers receive quality service when obtaining their ISP service over Time Warner Cable's systems. And unlike arrangements such as DSL, where telephone companies sell wholesale transport to ISPs, Time Warner Cable's multiple ISP business model is structured so that both Time Warner Cable and the ISP take full responsibility for the service customers receive.[55]

Another important aspect of this model is that both Time Warner Cable and the ISP can sell directly to customers. When Time Warner Cable is the selling party, it sets the price. When the ISP is the selling party, it does so. This system benefits consumers because it provides more information about ISP choices and pricing options than would be the case if only one party were the retailer. When customers call Time Warner Cable, they learn about the variety of ISPs available over Time Warner Cable's systems, thereby fostering intramodal competition. When

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[54] *See Time Warner Cable Touts Multi-ISP Upside: MSO Executive Says Early Deployments Boost Cable Modem Subscriber Additions Up to 25 Percent,* CABLE DATACOM NEWS, May 1, 2002, located at http://www.cabledatacomnews.com/cgi-bin/printer.cgi (last visited June 12, 2002).

[55] As the Commission correctly recognizes, this business model "represents a cooperative arrangement between AOL Time Warner and the ISP." *NPRM* ¶ 53.

they call the ISP, they learn about the variety of platforms that the ISP uses to make its services available, including both broadband and narrowband alternatives, thereby fostering intermodal competition.

Time Warner Cable is putting its reputation on the line with every ISP its sells, both in the case of affiliated ISPs like AOL, and unaffiliated ones like EarthLink. Time Warner Cable knows that if customers are dissatisfied with EarthLink as delivered on Time Warner Cable's systems, they will most likely conclude that cable modem service has not met their expectations, and switch to another platform, like DSL, rather than another ISP offered on Time Warner Cable's systems. Accordingly, Time Warner Cable has every incentive to ensure its cable modem subscribers have a positive experience, whether the ISP is affiliated or unaffiliated. As a result, Time Warner Cable believes that consumers are the primary beneficiaries of its partnering model.

2. A marketplace solution is preferable to a multiple ISP regulatory mandate.

So long as the Commission's "vigilant restraint" policy results in meaningful progress towards the goal of multiple ISP choice for consumers, regulatory intervention would be unnecessary. In particular, Time Warner Cable remains fully committed to providing its cable consumers with a choice of affiliated and unaffiliated ISPs. Today, Time Warner Cable provides consumers in 35 of its 39 divisions with a choice of at least three national ISP services: America Online, Road Runner, and EarthLink. Time Warner Cable plans to launch its national multiple ISP offering in three additional divisions this week, and in the final division next week. Thus, Time Warner Cable anticipates that this roll-out will be completed company-wide wherever high-speed Internet services are available by the end of this month.

Time Warner Cable has also entered into additional agreements with national and regional ISPs, which will allow its cable systems to offer consumers additional ISP choice in each division. These include:

- An agreement with Inter.net US Ltd. for the provision of ISP service on Time Warner Cable systems nationwide;
- An agreement with Big Net Holdings, Inc. for the provision of ISP service on Time Warner Cable systems nationwide;
- An agreement with New York Connect.Net Ltd. for the provision of ISP service on Time Warner Cable systems in New York, NY;
- An agreement with Internet Junction Corp. for the provision of ISP service on Time Warner Cable systems in its Tampa Bay and Central Florida Divisions;
- An agreement with LocalNet Corp. for the provision of ISP service on Time Warner Cable systems in its Albany, Binghamton, Liberty, Rochester and Syracuse, NY Divisions;
- An agreement with West Central Ohio Internet Link, LLC for the provision of ISP service on Time Warner Cable systems in its Cincinnati, Columbus, Northeast Ohio and Western Ohio Divisions;
- An agreement with its Global Systems, Inc. for the provision of ISP service on Time Warner Cable systems in its Charlotte, Greensboro and Raleigh, NC, and South Carolina Divisions;
- An agreement with Digital Communications Networks Inc. for the provision of ISP service on Time Warner Cable systems in its Los Angeles, CA Division;
- An agreement with Athena Services, Inc. for the provision of ISP service on Time Warner Cable systems in Milwaukee, Appleton and Green Bay, WI;
- An agreement with Web One, Inc. for the provision of ISP service on Time Warner Cable systems in its Kansas City Division;
- An agreement with Internet Nebraska Corp. for the provision of ISP service on Time Warner Cable systems in its Lincoln, NE Division;
- An agreement with DURO Communications Corp. d/b/a Volaris Online for the provision of ISP service on Time Warner Cable systems in its Memphis, TN and Jackson, MS Divisions;

- An agreement with Applied Technology Group, Inc. for the provision of ISP service on Time Warner Cable systems in its Bakersfield, CA Division; and

- An agreement with ShreveNet, Inc. for the provision of ISP service on Time Warner Cable systems in its Shreveport, LA Division.

As the Commission notes in the *NPRM*, several other large MSOs have taken preliminary steps towards offering multiple ISP choice, although their progress lags significantly behind that of Time Warner Cable.[56] As more cable operators realize that multiple ISP availability is not only beneficial to consumers but also to their own economic interests, there is every reason to believe that marketplace forces will continue to advance the Commission's objectives. Indeed, at least so long as ILECs have an obligation to provide DSL transport to unaffiliated ISPs, cable operators will have an incentive also to offer choice to consumers to remain competitive with DSL.

AOL Time Warner appreciates the concerns expressed by Commissioner Abernathy that some cable operators may lag behind in recognizing the benefits of offering multiple ISP choice to consumers.[57] However, such concerns militate in favor of retaining the Commission's policy of "vigilant restraint." As long as marketplace forces continue to progress towards accomplishment of the Commission's goals with respect to multiple ISP choice on a reasonable and timely basis, embarking upon the huge regulatory undertaking that would be required to implement new mandatory multiple ISP access regulations would be premature and unnecessary.

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[56] *NPRM* ¶¶ 26, 83. *See, e.g., Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor to AT&T Corp. Transferee, Memorandum Opinion and Order*, 15 FCC Rcd 9816, ¶¶120-28 (2000) (declining to impose multiple ISP access requirements on AT&T based on the company's commitment to provide cable modem service through unaffiliated ISPs on its cable systems by June, 2002).

[57] *NPRM*, Separate Statement of Commissioner Kathleen Q. Abernathy ("I remain concerned that some cable operators may continue to offer consumers only a single brand of ISP service or that cable operators generally may offer only two or three options.").

III. EACH OF THE FORMS OF LOCAL REGULATION ADDRESSED IN THE *NPRM* WOULD BE PRE-EMPTED BY FEDERAL LAW.

As discussed above, imposition of new regulatory burdens on cable modem service cannot be justified as a matter of policy. We will show below that any imposition of such burdens would also run counter to federal law.

A. Federal Law Does Not Permit LFAs To Demand That Cable Operators Obtain Additional Information Service Franchises.

In the wake of the Commission's *Declaratory Ruling*, some LFAs have taken the position that cable operators can be required to obtain an additional franchise to provide cable modem service — or, put differently, that they must stop providing cable modem service until they have secured an additional franchise agreement with the LFA. The apparent reasoning underlying this position is that existing cable television franchise agreements authorize cable operators to use rights-of-way to provide only cable services; that, in light of the *Declaratory Ruling*'s conclusion that cable modem service is not a cable service, a franchise agreement authorizing a cable operator to provide cable service does not authorize the cable operator to provide cable modem service; and that cable operators therefore may provide cable modem service only if granted permission to that effect.[58]

In the *NPRM*, the Commission tentatively concludes that, "[o]nce a cable operator has obtained a franchise for [a cable] system, our information service classification should not affect

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[58]*See* Attachment A, Letter from Larry Dovalina, Office of the City Manager of the City of Laredo, Texas, to Susan Patten, Vice President of Government and Public Affairs, Time Warner Cable, Southwest Division, at 2 (Apr. 8, 2002) ("To the extent you are using and occupying the City of Laredo's public rights-of-way for [purposes other than transmitting cable services], it would appear that your use and occupation is unlawful, and you may be liable under applicable law."); Letter from Rick J. Hermus, Administrator, Village of Kimberly, Wisconsin, to Gary R. Matz, Time Warner Cable (May 7, 2002) ("it is our belief at this time that your providing service within our municipal property without permission or consent constitutes a trespass and taking of Village property without compensation").

the right of cable operators to access rights-of-way as necessary to provide cable modem service or to use their previously franchised systems to provide cable modem service."[59] That tentative conclusion is unquestionably correct: even where existing cable television franchises do not authorize the provision of cable modem service,[60] federal law would not permit LFAs to require an additional information service franchise.

Although LFAs' demands that cable operators obtain information service franchises are commonly framed as a condition to use of public rights-of-way, that is a transparent mischaracterization. In substance, these demands constitute regulation of the content that cable operators may transmit over their existing cable plant. Cable operators' cable television franchises already give them permission to dig up the streets to lay and maintain wires and associated equipment.[61] And the provision of cable modem service does not make the burden on public rights-of-way any heavier: it does not require any addition of plant or equipment housed on public rights-of-way. A requirement to obtain an information service franchise before providing cable modem service would therefore have nothing to do with reasonable restrictions

[59]*NPRM* ¶ 102; *see id.* ("[W]e tentatively conclude that Title VI does not provide a basis for a local franchising authority to impose an additional franchise on a cable operator that provides cable modem service.").

[60]In fact, most existing franchises, when interpreted properly, do not limit authorization to the provision of "cable services" as that term is now defined by the Commission.

[61]Section 621(a)(2) of the Act provides that "[a]ny franchise shall be construed to authorize the construction of a cable system over public rights-of-way." 47 U.S.C. § 541(a)(2). Cable operators' transmission of a non-cable service through cable wires does not make their cable systems any less a "cable system." *See NCTA v. Gulf Power Co.*, 122 S. Ct. 782, 786 (2002) ("If one day [a cable operator's] cable provides high-speed Internet access, in addition to cable television service, the cable does not cease, at that instant, to be an attachment 'by a cable television system.'"); *see also* H.R. REP. NO. 98-934, at 44 (1984) ("[C]able operators are permitted under the provisions of Title VI to provide any mixture of cable and non-cable service they cho[o]se . . . . A facility would be a cable system if it were designed to include the provision of cable services (including video programming) along with communications services other than cable service.").

on the use of public rights-of-way. In substantive effect, it would be a prohibition on using a franchised cable system to provide one particular service: cable modem service.

Any such prohibition would clearly be pre-empted by federal law. *First*, any such prohibition would run afoul of Section 624 of the Communications Act.[62] Subsection (a) of Section 624 provides that a "franchising authority may not regulate the services . . . provided by a cable operator except to the extent consistent with this subchapter."[63] The plain language of this provision extends to *all* services provided by a cable operator — not just cable services. Thus, a prohibition on the provision of cable modem service would "regulate the services . . . provided by a cable operator." And such regulation clearly would not be "consistent with" Title VI: nothing in Title VI allows LFAs to require that cable operators obtain information service franchises. In addition, Subsection (b) of Section 624 provides that a "franchising authority . . . may not . . . establish requirements for . . . information services."[64] A prohibition on providing cable modem service would plainly constitute a "requirement" with respect to "information services": it would require cable operators not to provide the service.

Second, at a more fundamental level, any prohibition on the provision of cable modem service would be pre-empted by the basic design of the Act. As the Commission has determined, cable modem service is an *interstate* communications service.[65] Only the FCC may regulate interstate communications services. As noted above, it is well established that the Act grants the

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[62] 47 U.S.C. § 544.

[63] *Id.* § 544(a).

[64] *Id.* § 544(b).

[65] *See NPRM* ¶ 59.

FCC jurisdiction to regulate interstate communications, and that this jurisdiction is exclusive.[66] Thus, LFAs would be no more within their rights if they required cable operators to obtain information service franchises before offering cable modem service than if they required long distance carriers to obtain certificates of public necessity and convenience prior to offering interstate long distance service.

Third, the FCC has expressly pre-empted state regulation of all *information* services. As the Commission put it in the *Computer II* rulemaking: "we have determined that the provision of enhanced services is not a common carrier public utility offering and that efficient utilization and full exploitation of the interstate telecommunications network would best be achieved if these services are free from public utility-type regulation."[67] Because that conclusion survived judicial

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[66] *See, e.g., Universal Service Order* ¶ 836 (47 U.S.C. § 152(a) "grants the Commission sole jurisdiction over interstate and foreign communications"); *Petitions of MCI Telecommunications & GTE Sprint Communications Corp.*, Memorandum Opinion and Order, 1 FCC Rcd 270, ¶ 23 (1986) (Commission has "exclusive jurisdiction over interstate communications").

[67] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry),* Memorandum Opinion and Order on Further Reconsideration, 88 F.C.C.2d 512, ¶ 83 n.34 (1981); *see Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, Report and Order, 104 F.C.C.2d 958, ¶ 343 (1986) ("*Computer III*") ("[W]e determined that since the provision of enhanced services is not common carriage, the efficient utilization and full exploitation of the interstate telecommunications network would best be achieved if such services are free from regulation. Therefore, we preemptively deregulated enhanced services, foreclosing the possibility of state regulation of such offerings.") (footnote omitted); *id.* ¶ 347 ("By retaining the existing general regulatory framework for unregulated enhanced services, we do not alter our conclusion in *Computer II* that such services must remain free of state and federal regulations. Our original reasons for deregulating enhanced services are, if anything, more compelling now, as the telecommunications industry in general and the enhanced services market in particular have become increasingly competitive."); *see also* Peter W. Huber, Michael K. Kellogg & John Thorne, *Federal Telecommunications Law* § 12.4.2, at 1093 (2d ed. 1999) ("To make sure that regulation of enhanced services did not materialize at the local level, the Commission invoked 'ancillary jurisdiction' under Title I of the Communications Act to pre-empt any inconsistent state regulation.").

review,[68] state regulation of information services has never come about.[69] It should not be permitted to begin now. The Commission has decided that cable modem service constitutes an information service.[70] It follows that state regulation is pre-empted — even without any further Commission action at this time.

Fourth, a state law ban on providing cable modem service would violate Dormant Commerce Clause principles. A flat ban would constitute a serious burden on interstate commerce, and could therefore be justified only if necessary to achieve substantial local benefits.[71] That test is not met: the local benefit in whose name the prohibition is imposed — regulation of burdens on public rights-of-way despite already existing cable television franchises and an absence of added plant or equipment — is insubstantial. Besides, "courts have long held that state regulation of those aspects of commerce that by their unique nature demand cohesive national treatment is offensive to the Commerce Clause."[72] The Internet and access to it undoubtedly fall within that category.[73]

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[68]*Computer & Communications Industry Ass'n v. FCC*, 693 F.2d 198, 210-12 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983); *see also Computer III* at ¶ 348 ("We find that our authority to preempt such state regulation is supported by the court decision upholding our decision in *Computer II* to deregulate the provision of enhanced services by common carriers and others.").

[69]*Federal Telecommunications Law* § 12.4.2, at 1094 ("[U]nder the Commission's watchful eye, state regulation of information services has not developed.").

[70]*See Declaratory Ruling* ¶ 38.

[71]*See generally Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (state regulation burdening interstate commerce will be struck down when "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits").

[72]*American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 169 (S.D.N.Y. 1997); *see also MTS and WATS Market Structure*, Third Report and Order, 93 F.C.C.2d 241, ¶ 57 (1983) (citing *Wabash, St. L. & Pac. Ry. v. Illinois,* 118 U.S. 557 (1886)).

[73]*Pataki*, 969 F. Supp. at 169 ("[T]he Internet is one of those areas of commerce that must be marked off as a national preserve to protect users from inconsistent legislation that, taken to its

Finally, a ban on the provision of cable modem service would raise serous First Amendment concerns. Providers of Internet access (including providers of cable modem service) engage in constitutionally protected speech and are entitled to the same level of First Amendment protection as newspaper publishers.[74] A flat ban on Internet access providers' speech therefore could not survive First Amendment scrutiny.[75]

The *NPRM* also asks whether LFAs would have authorization to require information service franchises even as a matter of state law.[76] In many states, the answer appears to be no. Many state statutes expressly authorize LFAs to award cable franchises, but they either say nothing about information service franchises or affirmatively forbid LFAs from demanding anything other than a cable television franchise.[77] In any event, none of this matters much. Even

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(footnote continued)
most extreme, could paralyze development of the Internet altogether."); *id.* at 181 ("The courts have long recognized that certain types of commerce demand consistent treatment and are therefore susceptible to regulation only on a national level. The Internet represents one of those areas; effective regulation will require national, and more likely global, cooperation. Regulation by any single state can only result in chaos, because at least some states will likely enact laws subjecting Internet users to conflicting obligations.").

[74]*See Comcast Cablevision of Broward County, Inc. v. Broward County*, 124 F. Supp. 2d 685, 694 (S.D. Fla. 2000).

[75]*See id.* at 696-97 (applying strict scrutiny to strike down an ordinance requiring cable operators to permit access to third party ISPs).

[76]*See NPRM* ¶ 103.

[77]*See, e.g.*, Ariz. Rev. Stat. § 40-283(D) ("Nothing contained in this subsection shall be construed to grant county boards of supervisors additional authority to require . . . cable television systems to obtain licenses or franchises."); Mich. Comp. Laws § 484.3108(11) ("A cable franchise . . . shall satisfy any requirement for the holder . . . to obtain a permit to provide information services or telecommunications services in the municipality."); New York Pub. Serv. Law § 219.2 (expressly authorizing LFAs to require franchises for cable service, but saying nothing about franchises for information service).

if LFAs had state law authority to prohibit the provision of cable modem service by cable operators without an information service franchise, that authority would be pre-empted by federal law — for all the reasons explained above.

B. Federal Law Does Not Permit Any Requirement That Cable Operators Continue To Pay Franchise Fees After, or Repay Franchise Fees Collected Before, the Commission Issued the *Declaratory Ruling*.

The Commission raises two legal questions with respect to franchise fees: (1) whether, after the *Declaratory Ruling*, LFAs can require cable operators to pay franchise fees with respect to revenue derived from cable modem service, and (2) whether cable operators can be made to repay franchise fees they collected prior to the *Declaratory Ruling*.[78] As explained below, the clear answer to both questions is no.

1. In the wake of the *Declaratory Ruling*, LFAs may no longer levy franchise fees on revenue derived from cable modem service.

The *NPRM* unambiguously concludes: "Given that we have found cable modem service to be an information service, revenue from cable modem service would not be included in the calculation of gross revenues from which the franchise fee ceiling is determined."[79] This conclusion is plainly correct.

Section 622(b) provides: "[T]he franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operator's gross revenues from the operation of the cable system *to provide cable services*."[80] Congress added the italicized language in 1996. Its purpose was to make clear that any revenue from telecommunications or

[78] *NPRM* ¶¶ 105-106.

[79] *Id.* ¶ 105.

[80] 47 U.S.C. § 542(b) (emphasis added).

other non-cable services earned by cable operators would be free from franchise fees.[81] Because the *Declaratory Ruling* establishes that cable modem service is not a "cable service,"[82] it is now clear that LFAs may not impose franchise fees with respect to revenue derived from cable modem service. Indeed, when LFAs previously filed comments in this docket, they advocated a "cable services" classification for precisely this reason: they themselves recognized that any other classification would mean that they would no longer be allowed to impose franchise fees.[83]

The *NPRM* goes on to state: "we tentatively conclude that Title VI does not provide an independent basis of authority for assessing franchise fees on cable modem service."[84] AOL Time Warner is not aware of any such basis of authority, either — whether in Title VI or elsewhere. Title VI generally provides that local regulation is pre-empted except to the extent

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[81]*See, e.g.*, H.R. REP. NO. 104-204, Pt. 1, at 93 (1995) (amendment "establishes that franchising authorities may collect franchise fees under section 622 of the Communications Act solely on the basis of the revenues derived by an operator from the provision of cable service"); S. REP. NO. 104-23, at 36 (1995) ("This change is intended to make clear that the franchise fee provision is not intended to reach revenues that a cable operator derives for providing new telecommunications services over its system that are different from the cable-related revenues operators have traditionally derived from their systems.").

[82]*See Declaratory Ruling* ¶ 60.

[83]*See, e.g.*, Comments of the National League of Cities, et al., at 13, GN Docket No. 00-185 (FCC filed Dec. 1, 2000) ("[T]he financial loss to local governments [in franchise fees] if cable modem service is not classified as a 'cable service' would cumulatively reach into the billions of dollars by the end of the decade."); Comments of the Town of East Hampton and the Town of Southampton, New York at 7, GN Docket No. 00-185 (FCC filed Dec. 1, 2000) ("[F]or the Commission to classify Internet access over cable as anything other than a 'cable service' would usurp the franchising and regulatory authority Congress permits to be exercised by local government units."); Comments by the Marin Telecommunication Agency at 7, GN Docket No. 00-185 (FCC filed Nov. 13, 2000) ("The failure to classify cable modem services as a cable service will have very adverse financial and regulatory consequences for public agencies on national basis. The substantial franchise fees that local public agencies were expecting to receive from cable modem services will be lost."); *see generally NPRM* ¶ 105 & n.348.

[84]*NPRM* ¶ 105.

specifically permitted.[85] The only provision permitting franchise fees is Section 622(a), which provides that cable operators "may be required under the terms of any franchise to pay a franchise fee."[86] That authorization, however, is expressly made "[s]ubject to the limitation of subsection (b)."[87] Because there is no other provision addressing franchise fees in Title VI, any imposition on cable operators that qualifies as a "franchise fee" — no matter how denominated — must comply with "the limitation of subjection (b)."

However characterized, any fee on revenue derived from cable modem service would unquestionably constitute a "franchise fee" for purposes of Section 622. That is so because "franchise fee" is defined to "include[] any tax, fee, or assessment of any kind imposed by a franchising authority . . . on a cable operator . . . solely because of [its] status as such."[88] Any fee imposed with respect to cable modem service plainly would be a fee imposed on a cable operator "solely because of its status as" a cable operator. As the term makes clear, only cable operators provide cable modem service.

Because a franchise fee on cable modem service revenue would constitute a "franchise fee" for purposes of Section 622, it inevitably follows that such revenue may not be subjected to fees. Subsection (b) of Section 622 provides that "the franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operator's gross

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[85]*See, e.g.*, 47 U.S.C. § 556(c) ("[A]ny provision of any franchise granted by [a franchising] authority, which is inconsistent with this chapter shall be deemed to be preempted and superseded.").

[86]Section 622(a) provides in its entirety: "Subject to the limitation of subsection (b) of this section, any cable operator may be required under the terms of any franchise to pay a franchise fee." 47 U.S.C. § 542(a).

[87]*See id.*

[88]*Id.* § 542(g)(1).

revenues . . . from . . . cable services."[89] Thus, any fee charged with respect to cable modem service revenue would count towards the 5 percent fee cap, while the cable modem service revenue would not go into the fee base — so that the sum total of fees would still be limited to 5 percent of cable services revenue. Franchise agreements commonly already require cable operators to pay a franchise fee of 5 percent of cable services revenue. Section 622(b) therefore does not permit additional exactions.

Even if a franchise fee imposed on cable modem service revenue somehow was not captured by the definition of "franchise fee" contained in Section 622, it would still be pre-empted for a separate reason: it would run afoul of the Internet Tax Freedom Act. That statute prohibits any new "taxes on Internet access."[90] Cable modem service qualifies as "Internet access."[91] It is true that the statute exempts from the "tax" definition "any franchise fee . . . imposed . . . pursuant to section 622."[92] Plainly, however, LFAs could not claim simultaneously that a fee is "imposed . . . pursuant to section 622" for purposes of the Internet Tax Freedom Act, but is not a "franchise fee" for purposes of Section 622.

LFAs cannot avoid the limits of Section 622 and the Internet Tax Freedom Act by imposing fees on third party ISPs that provide service pursuant to multiple ISP arrangements. It is true that Section 622(h)(1) states that "[n]othing in this chapter shall be construed to limit any authority of [an LFA] to impose a [franchise fee] on any person (other than a cable operator) with respect to cable service or other communications service provided by such person over a

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[89] *Id.* § 542(b).

[90] *Id.* § 151 note (§ 1101(a)(1)).

[91] *See id.* (§ 1104(5)); see also *Declaratory Ruling* ¶ 38 ("We find that cable modem service is an offering of Internet access service. . . .").

[92] *Id.* (§ 1104(8)(B)).

cable system for which charges are assessed to subscribers but not received by the cable operator."[93] But that provision was designed to serve the limited purpose of preventing cable operators from avoiding franchise fees by having programming services (say, HBO) bill subscribers directly.[94] It was plainly not intended to permit broader assessment of third parties than of cable operators. It is difficult to see what policy basis could justify such a discrepancy, and there is no historical evidence that Congress intended it.[95] It would be pointless in any event: the heavier assessment could readily be avoided simply by having the cable operator do the billing.

It is true that Section 622(h) uses the phrase "cable service or other communications service" — a phrase that is broader than the phrase "cable services" in Section 622(b). But Section 622(h) was enacted as part of the *1984 Cable Act* — long before the advent of cable modem service and the classification controversy surrounding it. The part of Section 622(b) that makes clear that LFAs may tax only "cable services" was inserted as part of the *1996 Act* to prevent exactions imposed on revenue derived from services other than cable services. Congress's failure to remove "or other communications service" from Section 622(h) was thus

[93]47 U.S.C. § 542(h)(1).

[94]*See* H.R. REP. NO. 98-934, at 65 ("This provision is included to assure that cable operators and cable programmers do not rearrange the manner of payment by subscribers for services in order to avoid those fees which are based on the cable operator's revenues.").

[95]*See, e.g., National Pub. Radio, Inc. v. FCC*, 254 F.3d 226, 230 (D.C. Cir. 2001) (FCC need not slavishly follow statutory language where it appears "either that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it") (citation and internal quotation marks omitted).

an inconsequential oversight, and should not be viewed as a strangely underhanded way of allowing broader exactions on third parties.[96]

Besides, Section 622(h)(1) says only that "[n]othing in *this chapter* [*i.e.*, the Communications Act of 1934] shall be construed" to prohibit a fee. By its terms, Section 622(h)(1) does not foreclose regulation by the Commission, thus leaving open the possibility of a Commission rule prohibiting LFAs from taxing ISPs. In addition, Section 622(h)(1) has nothing to say about statutes other than the Act. Accordingly, even if Section 622(b) would not prohibit LFAs from assessing ISPs, the Internet Tax Freedom Act would. A franchise fee imposed on an ISP plainly would not be "imposed . . . pursuant to section 622" for purposes of the Internet Tax Freedom Act — it would be imposed *despite* Section 622.

2. The Commission should make clear that cable operators cannot be required to repay subscribers franchise fees collected prior to the *Declaratory Ruling*.

The Commission notes that its "policy has been to resolve franchise fee questions that bear directly on a national policy concerning communications and that call upon our expertise."[97] The Commission asks "whether disputes regarding franchise fees based on cable modem service implicate such a national policy," and specifically "whether it is appropriate to exercise our jurisdiction under section 622 to resolve the issue of previously collected franchise fees based on

[96] *See, e.g.*, *Chickasaw Nation v. United States*, 122 S. Ct. 528, 533 (2001) ("[C]ommon sense suggests that the cross-reference is simply a drafting mistake, a failure to delete an inappropriate cross-reference in the bill that Congress later enacted into law."); *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1043 (D.C. Cir. 2001) (per curiam) ("We find it quite plausible that the Congress substituted '(ii)' for '(i)' in § 126 inadvertently in the course of a routine renumbering of statutory cross-references.").

[97] *NPRM* ¶ 107.

cable modem service revenues or whether these issues are more appropriately resolved by the courts."[98]

The Commission unquestionably has jurisdiction to resolve this issue. The Commission has exercised its authority to interpret Section 622 on a number of occasions in the past.[99] The cable modem service issue now before the Commission is at least as important and national in scope as the issues resolved in the past. Unless the Commission now resolves the issue, expensive and vexing class action litigation might proliferate around the country: strike-suit lawyers purporting to represent cable subscribers may claim that cable operators must return franchise fees collected with respect to a service that, in hindsight, turns out not to be a fee-able cable service.[100] Any such actions would be meritless as a matter of state law,[101] pre-empted as a matter of federal law, and of more concern to LFAs than to cable operators. Nevertheless, there

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[98] *Id.*

[99] *See, e.g., Amendment of Parts 1,63 and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984*, Memorandum Opinion and Order, 104 F.C.C.2d 386, ¶¶ 18, 19 (1986) (noting its jurisdiction to decide "whether costs incurred in connection with [PEG] facilities should count toward the statutory five percent fee limit") (citation omitted); *United Artists Cable of Baltimore*, Memorandum Opinion and Order, 11 FCC Rcd 18158, ¶¶ 27-28 (1996) (deciding whether LFAs may charge a fee on bill items collected under the heading of "franchise fee"); *Time Warner Entertainment/Advance-Newhouse Partnership, et al., Petitions for Declaratory Ruling on Franchise Fee Issues*, Memorandum Opinion and Order, 14 FCC Rcd 7678, ¶ 12 (1999) (deciding whether uncollected debts may be included in the franchise fee base); *City of Pasadena, et al., Petitions for Declaratory Ruling on Franchise Fee Pass Through Issues*, Memorandum Opinion and Order, 16 FCC Rcd 18192, ¶ 15 (2001) (deciding whether franchise fees collected on nonsubscriber revenues may be passed through to subscribers).

[100] *See Bova v. Cox Communications, Inc.*, No. 7:01CV00090, 2002 WL 389264 (W.D. Va. Mar. 12, 2002); *Bova v. Cox Communications, Inc.*, No. 7:01CV00090, 2001 WL 1654708 (W.D. Va. Dec. 12, 2001).

[101] Because no federal cause of action is available, any action would have to rest on state law. It is entirely unclear how state law could afford subscribers a cause of action in connection with fees that they voluntarily paid to cable operators, and that cable operators collected and remitted in good faith in response to demands by LFAs.

is no good reason why the Commission should permit even the possibility that such meritless class action litigation might grow out of its *Declaratory Ruling.*

Exercising its jurisdiction, the Commission should make clear that cable operators that remitted franchise fees collected before the issuance of the *Declaratory Ruling* cannot be held liable to subscribers. There is plainly a strong policy basis for doing so. As the *NPRM* notes, "until the release of the Commission's declaratory ruling to the contrary, cable operators and local franchising authorities believed in good faith that cable modem service was a 'cable service' for which franchise fees could be collected pursuant to section 622."[102] And, "[a]s illustrated by the Fourth Circuit's statement in *Henrico County* . . . that 'the issue of the proper regulatory classification of cable modem service . . . is complex and subject to considerable debate,' cable operators and franchising authorities could not have been expected to predict that the Commission would classify cable modem service as other than a cable service."[103]

The Commission should therefore nip meritless class action litigation in the bud by making clear that any state law cause of action for a refund of bill items labeled "franchise fee" would be in conflict with Section 622. That provision expressly permits "[e]ach cable operator [to] identify . . . as a separate line item on each regular bill of each subscriber . . . [t]he amount of the total bill assessed as a franchise fee."[104] Thus, it affords cable operators a federal right to

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[102]*NPRM* ¶ 107.

[103]*Id.* (footnote omitted, alteration in original).

[104]47 U.S.C. § 542(c)(1); *see also id.* § 542(f) ("A cable operator may designate that portion of a subscriber's bill *attributable* to the franchise fee as a separate item on the bill.") (emphasis added); 47 C.F.R. § 76.985(a)(1) ("[c]able operators may identify as a separate line item of each regular subscriber bill . . . [t]he amount of the total bill *assessed* as a franchise fee") (emphasis added).

identify on their bills the amounts that LFAs have "assessed."[105] The franchise fees here at issue — rightly or wrongly — plainly were "assessed." Any state law cause of action penalizing cable operators for invoking their federal right to identify amounts assessed would therefore be in direct conflict with federal law, and, as such, pre-empted.[106] Whether or not the statute is unambiguous on this point, this Commission plainly can and, given the strong policy basis, should interpret it in this manner.

At a minimum, the Commission should determine that, insofar as franchise fees are concerned, the *Declaratory Ruling* has no retroactive effect. The Commission unquestionably has authority to do so. Indeed, in a quasi-legislative context like that here, the Commission's authority to make its decisions apply retroactively in the primary sense (*i.e.*, in the sense of altering the past legal consequences of past conduct) is severely constrained.[107] Thus, even

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[105]Congress's design in creating this right is plain: to prevent LFAs from requiring cable operators to obscure the franchise fee levied, thereby exposing LFAs to political pressure from cable subscribers and inhibiting overreaching in the franchising process.

[106]*See, e.g., Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 325-26 (1981) ("It would vitiate the overarching congressional intent . . . to permit the State of Iowa to use the threat of damages to require a carrier to do exactly what the Commission is empowered to excuse."); *Hill v. State of Florida*, 325 U.S. 538, 542-43 (1945) (holding that state law that penalized employees for invoking right protected under the National Labor Relations Act was pre-empted).

[107]*See, e.g., Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988) ("[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate [primary] retroactive rules unless that power is conveyed by Congress in express terms."); *Sierra Club v. Whitman*, 285 F.3d 63, 68 (D.C. Cir. 2002) ("We have held that the [Administrative Procedure Act] prohibits retroactive rulemaking."); *Bergerco Canada v. United States Treasury Dep't*, 129 F.3d 189, 192-93 (D.C. Cir. 1997) (suggesting as authoritative Justice Scalia's concurring opinion in *Bowen* that rules "altering the *past* legal consequences of past actions" are impermissible unless the agency has explicit statutory authorization to adopt them) (citation and internal quotation marks omitted, emphasis in original). Besides, even if the *Declaratory Ruling* had been issued in a quasi-adjudicative context, the Commission would still have ample authority to give it prospective effect only. *See, e.g., Epilepsy Found. of Northeast Ohio v. NLRB*, 268 F.3d 1095, 1102 (D.C. Cir. 2001) (retroactive adjudication not permitted if "notions of equity and fairness . . . militate strongly

without further Commission action, courts would likely interpret the *Declaratory Ruling* as having prospective effect only. Nevertheless, to eliminate any doubt, the Commission should now expressly determine that, at least insofar as franchise fees are concerned, the *Declaratory Ruling* applies only prospectively.

C. Federal Law Does Not Permit LFAs To Impose A Multiple ISP Requirement.

In the *NPRM*, the Commission seeks comment as to whether, in light of its ruling that cable modem service is an interstate information service, states and LFAs may still impose multiple ISP requirements on the provision of cable modem service.[108] The answer is that they may not. Specifically, several provisions of the Act prohibit such requirements in the face of the Commission's *Declaratory Ruling*. Thus, any conflicting state or local law is preempted by the express terms of the Act.[109]

1. Section 624(a).

Section 624(a) of the Act restricts an LFA from regulating "the services, facilities, and equipment provided by a cable operator except to the extent consistent with this title."[110] Nothing in Title VI permits LFAs to require cable operators to offer raw "transport" to ISPs, or

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(footnote continued)
against retroactive application") (internal quotation marks omitted), *cert. denied*, 2002 U.S. LEXIS 4231 (June 10, 2002); *Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750, 756 (D.C. Cir. 1987) (retroactive adjudication not permitted if "the inequities produced by retroactive application are not counterbalanced by sufficiently significant statutory interests"), *aff'd*, 488 U.S. 204 (1988).

[108] *NPRM* ¶ 100.

[109] 47 U.S.C. § 556(c) ("[e]xcept as provided in Section 557 [regarding pre-existing PEG channel requirements], any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this Act shall be deemed to be preempted and superceded.")

[110] 47 U.S.C. § 544(a).

even to provide cable modem service in connection with an affiliated ISP, for that matter. Significantly, the Section 624(a) restriction is not limited merely to *cable* services, but precludes LFA regulation of any "services" offered by a cable operator, which obviously includes information services. Accordingly, a multiple ISP requirement would not be "consistent with this title."

2. Section 624(b).

Section 624(b) of the Act provides that "[i]n the case of any franchise granted after the effective date of this title, the franchising authority . . . may not . . . establish requirements for video programming or other *information services*."[111] Since the Commission has ruled that cable modem service is an information service, LFAs obviously may not establish any "requirements" with respect to information services, including a multiple ISP requirement.[112]

This would also be the case in franchise renewal situations. While Section 626 of the Act permits an LFA to establish minimum requirements that a cable operator must include in its franchise renewal proposal,[113] this authority is expressly limited by the Section 624(b)(1) prohibition against requirements as to information services, and the statute specifically applies to a "request for proposals for a franchise (including requests for renewal proposals . . .)."[114] Moreover, given that cable modem service has been determined not to be a "cable service," provision of cable modem service by a cable operator is not relevant to "cable-related

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[111] 47 U.S.C. § 544(b)(1) (emphasis added).

[112] Similarly, a requirement that cable operators provide "transmission" to unaffiliated ISPs would run a foul of Section 624(e) which states that "[n]o State or franchising authority may prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or any transmission technology." 47 U.S.C. § 544(e).

[113] 47 U.S.C. § 546(b)(2).

[114] 47 U.S.C. § 544(b)(1).

community needs and interests," the threshold standard for renewal under Section 626.[115]

3. Section 621(b)(3)(D).

Section 621(b)(3)(D) provides that "a franchising authority may not require a cable operator to provide any telecommunications service or facilities . . . as a condition of the initial grant of a franchise, a franchise renewal, or a transfer of franchise."[116] Thus, a precondition to transfer or renewal that mandates that a cable operator provide raw transport service to unaffiliated ISPs, in essence making the cable system a common carrier platform, is invalid under Section 621(b) because it constitutes a requirement that a cable operator provide "telecommunications service."[117]

Alternatively, a multiple ISP requirement would similarly be invalid under Section 621(b)(3)(D) because it would constitute a requirement that the cable operator provide "telecommunications facilities." In *MediaOne Group, Inc. v. County of Henrico,* the U.S. Court of Appeals for the Fourth Circuit found that a multiple ISP obligation violated 621(b)(3)(D) as an invalid requirement that a cable operator provide "telecommunications facilities."[118] According to the court, "although MediaOne maintains a 'cable *system*,' its facilities can be properly classified as telecommunications facilities when they provide a transmission path to the

[115] 47 U.S.C. § 546(c)(1)(D).

[116] 47 U.S.C. § 541(b)(3)(D).

[117] A requirement that a cable operator provide "telecommunications service" also would be void under Section 621(c) of the Act, which provides that "[a]ny cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service," as well as pursuant to Section 621(b)(3)(B), in that such a requirement would have "the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator or an affiliate thereof." 47 U.S.C. §§ 541(c), (b)(3)(B).

[118] 257 F.3d 356, 363-365 (4th Cir. 2001).

Internet."[119] Regardless of whether classified as requirements for "telecommunications services" or "telecommunications facilities," therefore, any such requirements, when imposed as preconditions to renewal or transfer of a cable franchise, are prohibited by law.

4. First Amendment.

The Supreme Court has firmly recognized cable operators' First Amendment rights.[120] Furthermore, a LFA-imposed requirement that a cable operator carry multiple ISPs has been rejected by a federal court as a violation of the First Amendment. Specifically, in *Comcast Cablevision of Broward County, Inc. v. Broward County, Florida*, the U.S. District Court for the Southern District of Florida held that a Broward County's ordinance requiring carriage of multiple ISPs "unconstitutionally abridges freedom of speech and the press."[121] According to the court:

> The Broward County ordinance operates to impose a significant constraint and economic burden directly on a cable operator's means and methodology of expression. The ordinance singles out cable operators from all other speakers and discriminates further against those cable operators who choose to provide Internet content.
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> * * *
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> The imposition of an equal access provision by operation of the Broward County ordinance both deprives the cable operator of editorial discretion over its programming and harms its ability to market and finance its service, thereby curtailing the flow of information to the public. It distorts and disrupts the integrity of the information market by interfering with the ability of market participants to use different cost structures and

[119] *Id.* at 364 (emphasis in original). While the court did not find it necessary to classify cable modem service to reach its decision, it noted that "[i]f Road Runner is classified as an information service, it would not be subject to local franchising or common carrier regulation." *Id.* (citing *Federal-State Joint Board on Universal Serv.*, Report, 13 FCC Rcd 11501, ¶ 39 (1998)).

[120] *See, e.g., Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997); *Leathers v. Medlock*, 499 U.S. 439, 444 (1991).

[121] 124 F. Supp. 2d 685, 686 (2000).

economic approaches based upon the inherent advantages and disadvantages of their respective technology.[122]

Moreover, while the court applied strict scrutiny to the Broward County ordinance, it also found that "the ordinance fails content-neutral scrutiny as well."[123] The court found that "the harm the ordinance is purported to address appears to be non-existent. Cable possesses no monopoly power with respect to Internet access. Most Americans now obtain Internet access through use of the telephone."[124] The court also cited the Commission's findings that cable operators do not have monopoly power as to advanced telecommunications capability or broadband, due to healthy competition from DSL and other technologies.[125] In contrast, the court concluded that "[t]he County has proffered no substantial evidence demonstrating that actual harm exists that could justify infringement of First Amendment interests."[126]

The court noted that, ironically, the result of the Broward County ordinance was that cable operators did not choose to provide cable modem service in the County at all.[127] Thus, citizens in the County ended up with less, not more, information, which is of course completely contrary to the purpose of the First Amendment. Fortunately, as the *Broward County* decision indicates, local multiple ISP requirements violate the First Amendment and are thus prohibited.

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[122] *Id.* at 692-693.

[123] *Id.* at 697.

[124] *Id.*

[125] *Id.* at 698 (citing FCC News Release: *FCC Issues Report on the Availability of High-Speed and Advanced Telecommunications Services*, 2000 FCC LEXIS 4041 (Aug. 3, 2000)).

[126] *Id.*

[127] *Id.* at 694.

5. Fifth Amendment.

The Fifth Amendment to the Constitution provides, in relevant part: "No person shall... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."[128] In *Kaiser Aetna v. United States,* the Supreme Court held that the federal government could not force the developers of a private marina in Hawaii to open the marina's waters to the public without just compensation because opening the private waterway destroyed the developers' right to exclude, would substantially devalue the property, and constituted an actual physical invasion of a privately owned area.[129] Permanent physical occupation of a cable operator's plant and facilities, which would result from a multiple ISP requirement, obviously raises similar Fifth Amendment considerations.[130]

Citing *Penn Central Transportation Co. v. New York,*[131] the Court in *Kaiser Aetna* named three key factors in determining whether a public action equals a taking: "the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action."[132] A multiple ISP requirement involves the permanent physical taking of property -- in this case, channel capacity and the associated portion of the cable system wires, facilities and physical plant needed to utilize such channel capacity -- that cable operators invested in and constructed, and the allocating of such property to ISPs for their

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[128] U.S. Const. amend. V.

[129] 444 U.S. 164 (1979).

[130] *Id.* at 180

[131] 438 U.S. 104 (1978).

[132] *Kaiser Aetna* at 175.

own use.[133] Such taking would lower the value of the cable system, since the cable operator loses control over and usage of a portion of the system, thereby interfering with the cable operator's reasonable investment backed expectations. Moreover, it is well-settled that physical intrusion into the use of private property is a restriction of an "unusually serious character."[134]

An intrusion on physical property such as would result from the government's imposition of multiple ISP requirement is particularly suspect where the basis for regulatory action is speculative in nature. In *Midwest Video Corp. v. FCC*, the U.S. Court of Appeals for the Eighth Circuit ruled that the Commission exceeded its authority in its 1976 Report and Order establishing mandatory channel capacity and access rules on certain cable operators.[135] According to the court:

> Regulations like those before us, profoundly altering the obligations of a private business, requiring a fundamental change in its nature, and imposing costs on its consumer-subscribers, should be based on more than an uncertain trumpet of expectation alone. In enforcing regulations designed by the regulator to make futuristic visions come true, courts must proceed with a care proportional to the risk of delivering thereby into the

[133] Nor is there any reason to treat the electronic invasion of property that would be occasioned by a multiple ISP requirement differently than other forms of physical invasions. *See United States v. Morris*, 928 F. 2d 504, 511 (2d Cir. 1991) (ruling that commonly understood legal concepts such as "authorization" do not need to be reformulated when applied to cybercrimes), *cert. denied*, 502 U.S. 817 (1991); *America Online, Inc. v. LCGM, Inc.*, 46 F. Supp. 2d 444, 451 (E.D. Va. 1998) (citing *CompuServe, Inc. v. Cyber Promotions*, 962 F. Supp. 1015, 1021 (S.D. Ohio 1997)) (holding electronic signals generated and sent by computers are sufficiently tangible to support a trespass claim).

[134] *See, e.g.*, *Kaiser Aetna*, *supra*, 444 U.S. at 179-180; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). In *Loretto,* the Supreme Court held that a New York City ordinance permitting a relatively minor physical invasion of property -- placing a cable box on the side of an apartment complex -- constituted a taking under the Fifth Amendment and remanded the case for further hearing regarding compensation. Obviously, under the *Loretto* standard, a local law requiring the much more intrusive permanent physical occupation of cable system channel capacity and associated physical plant by unaffiliated ISPs is a taking under the Fifth Amendment.

[135] 571 F.2d 1025 (1978); *aff'd*, *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979).

> regulator's hands an awesome power. For that way may lie not just a totally regulated future, unpalatable as that may be to a free people, but a government-designed, government-molded, government-packaged future.[136]

This concern is especially relevant in the case of multiple ISP cable modem service and broadband Internet access, where, as AOL Time Warner explains in Section I.C. above, the Commission's policy of "vigilant restraint" appears to be a far less intrusive means of achieving the desired ends.[137] At a minimum, a complex administrative scheme would be needed to ensure that cable operators received just compensation from ISPs under a multiple ISP requirement.[138]

In sum, as evidenced by Title VI of the Communications Act and the First and Fifth Amendments to the Constitution, LFAs may not use their franchising powers to dictate how a cable system offers non-cable and/or information services such as cable modem service except in a manner prescribed by federal law. The Commission should reinforce this policy by confirming that the Act expressly denies state or local authority to impose multiple ISP obligations.[139]

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[136] *Id.* at 1045.

[137] Additionally, in *Bell Atlantic Telephone Co. v. FCC*, the U.S. Court of Appeals for the D.C. Circuit, using the standard set in *Loretto*, held that the Commission's requirement that LECs set aside a portion of their central offices for occupation and use by competitive access providers was a taking under the Fifth Amendment, and was thus impermissible because it was not specifically authorized by the Act. Obviously, as explained above in this section, the Act not only fails to authorize multiple ISP requirements, it prohibits LFAs from imposing them. Clearly, therefore, under the standard used in *Bell Atlantic*, multiple ISP requirements would be struck down as a violation of the Fifth Amendment.

[138] *See Federal Power Comm'n. v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) (holding that a regulatory taking is unjust if its calculation of compensation does not allow the regulated entity to maintain its financial integrity, attract capital, and compensate investors for assumed risk).

[139] In order to avoid assertions of conflicts between federal policy and state law, the Commission should also clearly preempt any state laws that grant local governments authority to regulate information services provided by either cable systems or other wireline providers such as DSL providers.

CONCLUSION

For all the reasons outlined above, the Commission, in keeping with its longstanding federal deregulatory approach towards information services, should exercise vigilant restraint and refrain from imposing any regulations on cable modem service at this time. This includes ruling that (1) cable operators do not need to obtain additional information service franchises; (2) local franchising authorities may not assess franchise fees on cable modem service, but cable operators need not refund to subscribers any such fees previously collected; (3) other MSOs should follow Time Warner Cable's lead in providing its subscribers with multiple ISP choice, thereby allowing this salutary policy to occur in the marketplace and not by government fiat.

Respectfully submitted,

AOL TIME WARNER INC.

By: Arthur H. Harding

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Date: June 17, 2002

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ATTACHMENT A

CITY OF LAREDO

Office of the City Manager

LAREDO, TEXAS
1755

April 8, 2002

Ms. Susan Patten
Vice President of Government and Public Affairs
Time Warner Cable, Southwest Division
300 Parker Square, Ste. 210
Flower Mount, Tx 75028

Dear Ms. Patten:

Thank you for your letter of March 27, 2002 ("Time Warner Cable Letter"), which was received by this office on March 28, 2002. We understand you take the position that the Federal Communications Commission (FCC)'s Declaratory Ruling and Notice of Proposed Rulemaking in GN Docket No. 00-185 and CS Docket No. 02-52, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, FCC 02-77 (March 15, 2002) ("FCC Ruling"), authorizes you to cease paying cable franchise fees on the revenues you receive from cable modem service. While we appreciate the reasons for your views, we suggest that you may wish to review the matter and reconsider your position. The interpretation you seem to espouse could present serious difficulties in connection with your cable franchise and your right to operate a system in the City of Laredo's public rights-of-way. In response to your suggestion in the Time Warner Cable Letter that we bring to your attention facts or circumstances that may affect your decision, we are providing these comments as promptly as possible.

First of all, as you are aware, the FCC Ruling has already been challenged by a number of parties in the U.S. Courts of Appeals. The current state of the law is uncertain and is developing rapidly. These appeals could well result in a complete or partial reversal or remand of the FCC's position on the classification of cable modem service. If so, your implementation of the Time Warner Cable Letter could lead to confusing and potentially undesirable consequences for Time Warner Cable. For example, Time Warner Cable could end up being liable for past franchise fees due on cable modem revenues without having the ability to retroactively raise subscriber rates to cover those fees. Time Warner Cable might also be subject to court sanctions for being in violation of the July 18, 1996 Settlement Agreement filed with the Webb County District Court of the State of Texas. Thus, it may be better in the long run to maintain the *status quo* than to change your existing policy during the pendency of the appeals.

More importantly, the position you take in the Time Warner Cable Letter raises a crucial question about your authority to use and occupy the City of Laredo's public rights-of-way for purposes of providing cable modem service. The City of Laredo has the full rights of a property owner to control the use of its public rights-of-way by private occupants, and to charge rent for that use. *See City of Dallas, Texas v. FCC*, 118 F.3d 393, 397-98 (5th Cir. 1997). The numerous Agreements, Ordinances and Judicial Settlements pursuant to which Time Warner operates in the public rights of way of Laredo all are clear that Time Warner Cable has the right to use the public rights-of-way for purposes of providing cable service, but for no other purpose.[1] To the extent you are using and occupying the City of Laredo's public rights-of-way for other purposes, it would appear that your use and occupation is unlawful, and you may be liable under applicable law.

In this connection, please note that the FCC Ruling does *not* declare that you can "piggyback" other services onto cable service and thus use a cable franchise as an entering wedge to obtain unlimited use of the City of Laredo's property. The FCC's only discussion of this issue, FCC Ruling at ¶¶ 101-105, merely raises questions concerning this matter, and does not purport to grant you authority forcibly to expand your rights with respect to the City of Laredo's property. Nor could the FCC do so without violating the City of Laredo's constitutional rights. The federal courts have already held that the FCC has not been granted preemptive authority to seize a local community's property for private use. *See City of Dallas, Texas v. FCC*, 165 F.3d 341 (5th Cir. 1999). Thus, your position in the Time Warner Cable Letter seems to threaten your continuing ability to provide cable modem service to subscribers in

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[1] *See* Section 3a of the Cable Franchise Ordinance. *See also* what have been referred to collectively as the "Franchise Documents" over the years in correspondence between the City and Time Warner Cable and its predecessors. Ordinance 83-0-0075, as amended ("Cable Franchise Ordinance"); Motion 83-O-0075a; Resolution 85-R-38; Resolution 86-R-61; Resolution 89-R-20; Resolution 89-R-21; the Settlement Agreement dated March 11, 1989; Ordinance 89-O-60; Ordinance 89-O-66; the Settlement Agreement Regarding the City of Laredo Cable System dated July 18, 1996; the Lease Agreement between the City of Laredo, Texas, as Lessee, and KBL Cablesystems of the Southwest, Inc., et al., as Lessor, dated July 18, 1996; Ordinance No. 99-0-144 authorizing and granting the consent of the City Council to the assignment and transfer of control of the cable television franchise and cable television Ordinance No. 99-0-145 consenting to the change of control of the cable television franchise from Telecommunications, Inc. ("TCI") to AT&T Corp.

the City of Laredo. That would be in no one's interest: both Time Warner Cable and the City of Laredo are eager to see citizens benefit from high-speed access to the Internet. We thus have a common interest in arriving at a mutually acceptable approach to this issue.

Moreover, the policy set forth in the Time Warner Cable Letter conflicts with your obligations under your current franchise agreement, as well as Section 3.3. of the July 18, 1996 Settlement Agreements endorsed by the Texas Courts and Section 4.5 of the June 21, 1999 Transfer Agreement.[2]

The aggregate result of these three agreements is that Time Warner Cable consented to pay five percent of its gross revenues, including revenues from cable modem service, in return for your use of the City of Laredo's property for that purpose. Further which you agreed cable modem service was a "'cable service' as provided under Title VI of the Communications Act of 1934, as amended unless otherwise designated by applicable law." [June 21, 1999 Agreement at § 4.5.] The FCC Ruling does not purport to amend federal law, a step that would in any case be beyond the FCC's authority. Thus, under the terms of your current agreement, you have already agreed to the specified compensation for your use of the City of Laredo's property to provide cable modem service. Even if it were constitutionally possible, the FCC Ruling does not expressly abrogate that contract or unilaterally release you from the terms of your agreement.

In addition, if you were justified in taking the position suggested in the Time Warner Cable Letter, your action would trigger your obligations to renegotiate the terms of the franchise due to a material change. This right and obligation on both parties is reserved in several of the "Franchise Documents."[3]

Employing your interpretation, the FCC Ruling would constitute a material alteration in the terms of that agreement due to a change in governing law. As a result, you would be obliged to negotiate in good faith to reconstitute the franchise agreement in a form which: (1) to the

[2] *See also* May 2, 2000 letter of John Fogarty, Associated General Counsel of Time Warner to Larry Dovalina, then the City of Laredo's Acting Assistant City Manager. In the letter Mr. Fogarty acknowledges that cable modem service is the type of cable service that is subject to the "State of Art" cable service requirements outlined in Section 3.3 of the 1996 Settlement Agreement and pledge that such a service would be provided as part of the cable services offered in the city as soon as commercially feasible..

[3] See footnote 1 supra.

maximum extent possible is consistent with applicable law, (2) enables Time Warner and the City of Laredo to perform in a manner equivalent to that required immediately prior to such alteration, (3) is consistent with the original intent of the parties, and (4) preserves the benefits bargained for by each party.

Arguably, such renegotiations would be more disruptive to Time Warner Cable's business and to the relationship between Time Warner Cable and the City of Laredo than maintaining the *status quo*.

A Better Plan of Action

For these reasons, the City of Laredo suggests that Time Warner Cable and the City of Laredo agree to an interim rental arrangement that can provide both the City of Laredo and Time Warner Cable reasonable certainty until either party concludes that a further change in the relationship is warranted. We propose that Time Warner Cable continue to pay rent as in the past for its use of our property to provide cable modem service, holding the City of Laredo harmless from any later demands for refunds. In turn, the City of Laredo will refrain from taking the position that the offering of cable modem service is beyond the scope of the authority we have granted to Time Warner Cable to use the City of Laredo's public rights-of-way. Either party on thirty days' notice could terminate such an agreement.

Alternatively, the City of Laredo is prepared to negotiate immediately a separate agreement with Time Warner Cable for the use of the City of Laredo's public rights-of-way for provision of cable modem service, at a fair and reasonable market price. Such an agreement would establish the terms of use for the City of Laredo's property independent of specific regulatory classifications. It would thus provide reasonable certainty on a continuing basis, regardless of the outcome of the appeals of the FCC Ruling.

We offer the above proposals as ways of resolving the current legal uncertainties while continuing to provide the benefits of advanced technology to subscribers in the City of Laredo. If, however, Time Warner Cable rejects both of the above proposals, then please consider this letter your notice that Time Warner Cable is in violation of its cable franchise and applicable law, by engaging in unauthorized use of the public rights-of-way. You are directed to cease immediately any further construction that is related to the provision of cable modem service in the City of Laredo; to keep track of all revenues derived in any way from the operation of your facilities in the City of Laredo, so that refunds or back payments may be made depending on the outcome of the ongoing legal disputes; and to provide with each scheduled franchise fee payment a full accounting of all your revenues for the preceding period related to cable modem service in the City of Laredo. You are directed to report on the same schedule all amounts by which you have reduced your cable modem charges to subscribers pursuant to the position taken in the Time Warner Cable Letter, including the starting amount from which such reduction is calculated and your basis for using that amount as the point of reference, together with a signed certification that Time Warner Cable has realized "no financial benefit" from eliminating the franchise fee. If you believe that cable modem service is neither a cable service nor a telecommunications service, please explain in detail, within ten business days from the date of this letter, the legal basis for your authority to use and occupy the public rights-of-way to provide cable modem service. In addition, you are directed to explain in detail within ten business days from the date of this letter, and to update on a monthly basis thereafter, any discounts you have offered in the City of Laredo for combinations of cable modem service with other service, accounting in each case for your allocation of the discount in calculating your cable franchise fees. Please submit to the City of Laredo as soon as possible for review and comment any language you propose to use for notifying customers of the FCC Ruling, so that the City of Laredo can provide feedback in advance regarding any potentially inaccurate or misleading language that might subject you to liability under applicable consumer protection law.

Sincerely,

Larry Dovalina

Larry Dovalina

LD/lbn

cc: Honorable Mayor and City Council
Esteban Ventura, Time Warner
Jerry Lederer, Miller Van Eaton
Telecommunications Commission

RICK J. HERMUS

ADMINISTRATOR
VILLAGE OF KIMBERLY

515 West Kimberly Ave.
Kimberly, WI 54136

920-788-7500
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May 7, 2002

"The Progressive Community"

Time Warner Cable
Mr. Gary R. Matz
290 Harbor Drive
Stamford, CT 06902

Dear Mr. Matz,

Be advised your recent correspondence dated April 4, 2002, and April 23, 2002, advising that you are refusing to collect and remit franchise fees for non-traditional cable services constitutes a breach of your franchise and Village Ordinance Title 9 Chapter 3 which requires collection and remission of a fee of 5% of "annual gross subscriber revenues."

Furthermore, you are in violation of Title 9, Chapter 3 which limits your business in the area of this franchise to the operation of your cable television system and neither your application or franchise authorize you to conduct transmission of other data or information without consent and franchise being granted by the Village of Kimberly.

Pending further notification we will consider you in violation of the franchise and ordinance for which you will be liable for remission of all unpaid fees plus interest at the statutory legal interest rate in Wisconsin of 5%.

At the present time we are investigating this matter further but we do not agree with your conclusion that the Federal Communications Commission ruling means that Time Warner is neither required nor permitted to collect fees for non-traditional services provided by cable systems presently located within our municipal properties.

Furthermore, it is our belief at this time that your providing services within our municipal property without permission or consent constitutes a trespass and taking of Village property without compensation in addition to interference with the rights of the Village to contract and pass ordinances within the Village's constitutional rights under the State of Wisconsin Constitution and authority granted to the Village of Kimberly by the State of Wisconsin under statutes.

Your interpretation of this ruling suggests that the FCC has legislative and constitutional authority to utilize physical equipment located on Village property while prohibiting the Village from charging a fee for doing so which is inconsistent with your application, the Village's ordinance, and State Statute Section 66.0419 in our opinion.

We urge you to immediately cure this default by our ordinance and contract.

Sincerely,

Rick J. Hermus
Administrator